

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES 'A' JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 495/JP/2019
निर्धारण वर्ष/Assessment Year : 2010-11

Smt. Santosh Gupta 3-TA-42, Jawahar Nagar, Jaipur	बनाम Vs.	Deputy Commissioner of Income Tax, Circle-06, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAPPG4778A		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ITA No. 496/JP/2019
निर्धारण वर्ष/Assessment Year :2010-11

Shri Vishnu Kumar Gupta 3-TA-42, Jawahar Nagar, Jaipur-302004	बनाम Vs.	Deputy Commissioner of Income Tax, Circle-06, Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: ADOPG9230B		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से/ Assessee by : Sh. Sandeep Taneja (CA)
राजस्व की ओर से/ Revenue by : Smt. Runi Pal (Addl.CIT)

सुनवाई की तारीख/ Date of Hearing : 22/10/2020
उदघोषणा की तारीख/Date of Pronouncement: 20/01/2021

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

These are two appeals filed by the respective assesseees against the orders of Id. CIT(A), Ajmer dated 08.01.2019 for A.Y 2010-11. Since the common issues are involved, both these appeals were heard together and are being disposed off by this consolidated order.

2. With the consent of both the parties, the case of Smt. Santosh Gupta, in ITA No. 495/JP/2019 is taken as the lead case for the purposes of present discussion wherein the assessee has taken the following grounds of appeal:

"1. That in the facts and circumstances of the case and in law, the CIT(A) grossly erred in sustaining the addition of Rs. 1,47,000/- holding misuse of client code without there being any document or material which could established that the client code modification was made which allegedly resulted in shifting of profit.

2. That in the facts and circumstances of the case and in law, the CIT(A) grossly erred in sustaining the addition of Rs. 2,940/- as commission allegedly paid by the appellant to the broker without there being any material on record which could established that the said amount was paid by the appellant to the broker.

3. Because the CIT(A) has erred in not considering that the Assessing Officer had committed jurisdictional error in issuing notice under section 148 of the Income Tax Act merely on suspicious. There was no material available with the Assessing Officer for formation of necessary belief. The notice issued merely on the basis of the information received from ADIT (Inv.), unit 1(3) Ahmedabad was bad and invalid.

4. That the CIT(A) grossly erred in considering that the Assessing Officer had passed the order in gross violation of principle of natural justice. The Assessing Officer had passed the order without providing copies of the material relied upon by him. The Assessing Officer did not provide the information received form ADIT(Inv.) unit 1(3) Ahmedabad, copies of the statement of the brokers and the clients who had allegedly confirmed misuse of client code modification facility.

5. That the CIT(A) erred in not considering that the Assessing Officer failed to provide opportunity of personal hearing to the appellant before

passing the assessment order. Further, the CIT(A) also erred in not considering that despite specific request, the Assessing Officer failed to provide opportunity to the appellant to cross examine the brokers and the clients.

6. That the CIT(A) erred in rejecting the grounds relating to validity of reopening of assessment under section 147 and issuance of notice under section 148 without assigning any reason. The impugned order being an unreasoned order deserves to be set aside."

3. Briefly stated the facts of the case are that the assessee has filed her original return of income on 30.03.2011 declaring total income of Rs. 54,03,120/- which was processed u/s 143(1) of the Act. Subsequently, the notice u/s 148 was issued on 27.03.2017 after recording reasons to believe that income amounting to Rs. 1,49,950/- has escaped assessment within the meaning of section 147 of the Act. In response, the assessee filed her return of income on 10.04.2017 at total income of Rs. 54,03,120/- as originally filed. Subsequently, the notice u/s 143(2) and 142(1) were issued and the assessment was completed u/s 143(3) read with section 147 at an assessed income of Rs. 55,53,060/- holding that the assessee has misused facility of client code modification and she has shifted-in contrived loss of Rs. 1,47,000/- and in this way, she has reduced her taxable income. Further, an amount of Rs. 2,940/- was also added towards commission paid @ 2% on such accommodation to the brokers. Being aggrieved, the assessee carried the matter in appeal before the Id. CIT(A) who has since confirmed the said addition and now the assessee is in appeal before us.

4. During the course of hearing, the Id. AR raised the various contentions challenging the assumption of jurisdiction u/s 147 and the order so passed by the AO u/s 147 r/w 143(3) of the Act. One of the contentions which has been

raised by the Id AR is that the order so passed by the AO is in gross violation of principle of natural justice. It was submitted that the notice u/s 148 was issued merely on the basis of the information received from the ADIT (Inv.) Unit-1(3), Ahmedabad. The Appellant vide its letter dated 08.05.2017, 14.11.2017, 20.11.2017 repeatedly requested to provide copy of the information received from ADIT (Inv.) Unit-1(3), Ahmedabad, however the learned AO did not provide the same. It was submitted that the appellant also vide its letter dated 08.05.2017, 14.11.2017, 20.11.2017 repeatedly requested to provide copy of the statements of the brokers and clients who allegedly confirmed misuse of client code modification facility. However the learned AO did not provide the same. It was submitted that the appellant vide its letter dated 20.11.2017 (reply to SCN) requested to provide opportunity to cross examine the brokers and clients, who allegedly confirmed misuse of client code modification facility. However the learned AO did not provide the opportunity to cross examine the said brokers and clients. Further, the appellant vide its letter dated 20.11.2017 (reply to SCN) requested the AO to grant an opportunity of personal hearing before passing final order. However the learned AO passed the order on the next day i.e. 21.11.2017 without providing opportunity to be heard in person. It was accordingly submitted that the learned AO has passed the order in gross violation of natural justice and therefore the same deserves to be set aside. It was further submitted that similar contentions were raised before the Id. CIT(A) which he has summarily rejected. In support of his contention, the Id. AR placed reliance on the decision of Hon'ble Supreme Court in case of Andaman Timber Industries vs. Commissioner of C. Ex., Kolkata-II (2015) 281 CTR (SC) 241.

5. Per contra, the Id. DR submitted that in this case, information was received from ADIT (Inv.) Unit-1(3), Ahmedabad. From the information, it was gathered by the AO that fictitious profits and losses, were created by some

brokers by misusing the Client Code Modification facility in F&O segment on NSE during the F.Y 2009-10. The brokers were alleged to be indulging in transferring the fictitious losses to different clients to reduce their tax liability and also fictitious profit to other clients. In some cases of brokers as well as clients, survey u/s 133A was carried out and they confirmed having misused the facility of client code modification to create fictitious losses/profits and in transferring profits and losses from original clients to modified clients. From the details received, it was noticed that during the year under consideration assessee has shifted-in ascertained loss of Rs. 1,47,000/-. In this way, net reduction in income due to misuse of client code modification facility comes to Rs. 1,47,000/-. For taking in such contrived losses the assessee would have paid commission also. On the basis of statement of brokers, the AO estimate that the assessee would have paid commission @ of 2% which comes to Rs. 2,940 out of books of accounts. Basis the same, the reasons were recorded and notice u/s 148 was issued to the assessee. It was submitted that in this case, loss of Rs. 1,47,000/- on transaction of shares of Nifty NO was originally accrued to M/s Sandeep Stocks Pvt. Ltd. and this loss was shifted to the assessee through her broker M/s Maverick Share Brokers Limited. It was submitted that specific details were available with the Assessing Officer which were duly shared with the assessee and our reference was drawn to the show cause notice dated 14.11.2017 issued by the Assessing Officer in this regard and reassessment was completed bringing the same to tax. The Id DR accordingly supported the order of the lower authorities.

6. We have heard the rival contentions and perused the material available on record. We find that the AO has relied on certain information received from ADIT (Inv.) Unit-1(3), Ahmedabad and survey conducted at the premises of certain brokers and clients wherein statements of these persons were recorded. During the course of reassessment proceedings, we find that the assessee has

repeatedly asked the Assessing officer to share with her, copy of the information received from ADIT (Inv.) Unit-1(3), Ahmedabad, copy of the statements of the brokers and clients and have also asked for an opportunity to cross-examine these persons who have allegedly confirmed misuse of client code modification facility as evident from various communication/letters written to the AO and placed on record. It is also a fact that the AO having acknowledged said communication and request from the assessee has not acted upon the same and has not shared such information/statements and an opportunity to cross-examine these persons was also not provided. It is a settled legal proposition as laid down by the Courts from time to time that where any third party material or statement of any third party is to be relied upon by the Revenue against the assessee, the latter be provided an opportunity whereby such information and statements are shared and the assessee be allowed an opportunity to put forward her defence and objections in this regard. Further, where the assessee so desires, an opportunity to cross examine the persons whose statements are recorded be provided to the assessee. However, in the instant case, we find that the AO has not shared such information/statements and an opportunity to cross-examine these persons was also not provided and therefore, the principle of natural justice is clearly violated in the instant case which renders the order so passed by the AO as invalid in the eyes of law. We find that even during the appellate proceedings, the assessee was not made available any such statements and even the right of cross examination was denied by the Id CIT(A) who exercises the co-terminus powers as that of the AO. Thus, in view of the decision of the Hon'ble Supreme Court in case of CCE vs. Andaman Timber Industries (supra), the assessment based on statement of third party without giving an opportunity to the assessee is not sustainable in law. The Hon'ble Supreme Court in case of Andaman Timber (Supra) while dealing with the issue has held in para 5 to 8 as under:-

"5. We have heard Mr. Kavin Gulati, learned senior counsel appearing for the assessee, and Mr. K. Radhakrishnana, learned senior counsel who appeared for the revenue.

6. According to us, not allowing the assessee to cross-examine the witness by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner as based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he as specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which could not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was no for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealer and what extraction the appellant wanted from them.

7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross

examination. That apart, the Adjudicating Authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to presuppose as to what could be the subject matter of the cross-examination and made the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.2.2005 was passed remitting the case back the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

8. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show Cause Notice."

7. In light of aforesaid discussions, the statement of a third party cannot be sole basis of the assessment without given an opportunity of cross examination and consequently it is a serious flaw which renders the order a nullity. In light of the same, we don't deem necessary to examine other contentions raised by the Id AR. The order so passed by the AO is hereby set-aside. The appeal of the assessee is thus allowed.

8. In ITA No. 496/JP/2019, both the parties fairly submitted that the facts and circumstances of the case are identical and similar contentions may be considered. As submitted by the both the parties, since facts and circumstances

of the case are exactly identical to facts and circumstances of the case in ITA No. 495/JP/2019, our findings and directions contained therein shall apply *mutatis mutandis* to this appeal. In the result, the matter is decided in favour of the assessee.

In the result, appeals of both the assessee are disposed off in light of above directions.

Order pronounced in the open Court on 20/01/2021.

Sd/-
(संदीप गोसाई)
(Sandeep Gosain)
न्यायिक सदस्य / Judicial Member

Sd/-
(विक्रम सिंह यादव)
(Vikram Singh Yadav)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 20/01/2021

*Ganesh Kr.

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Smt. Santosh Gupta, Jaipur
Sh. Vishnu Kumar Gupta, Jaipur
2. प्रत्यर्थी / The Respondent- DCIT, Circle-06, Jaipur
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 495 & 496/JP/2019}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar

